

has passed an order in appeal from the decision of the Income-tax Officer.

In our opinion, therefore, though perhaps not for the same reasons as stated in the judgment of the Tribunal, the Tribunal was right in the conclusion it came to that the Commissioner was not competent to pass an order under s. 33-B when an appeal against the order of the Income-tax Officer had been decided by the Appellate Assistant Commissioner.

We, therefore, answer the question submitted to us in the negative. The Commissioner to pay the costs.

Attorneys for Commissioner: *N. K. Petigara.*

Attorneys for respondents: *Kanga & Co.*

Answer accordingly.

P. M. P.

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COMMISSIONER
OF INCOME-TAX
v.
MESSRS.
TEJAJI
FARASRAM

*Chagla
C. J.*

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Tendolkar.

THE COMMISSIONER OF INCOME-TAX, BOMBAY NORTH, KUTCH AND SAURASHTRA, BARODA, APPLICANT *v.* AMRITLAL BHOGILAL AND CO., RESPONDENT.*

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Indian Income-tax Act (XI of 1922), s. 33-B—Appeal from order of Income-tax Officer pending before Appellate Assistant Commissioner—Whether Commissioner can exercise powers of revision under s. 33-B in such case.

The object in enacting s. 33-B of the Indian Income-tax Act, 1922, was to confer an exceptional power on the Commissioner of income-tax in the interest of public revenue to revise orders of Income-tax Officers, which (however erroneous or prejudicial to the public revenue) could not, prior to enactment of this section, be revised under any circumstances and became conclusive, if the assessee did not appeal against such orders. In order to fill up this lacuna the Legislature enacted that section; but once the assessee has preferred an appeal, there is no difficulty whatsoever in the way of the Income-tax Department in agitating any question before the Appellate Assistant Commissioner or the Income-tax Appellate Tribunal which in its opinion should be agitated and decided in the interest of the public revenue. When, therefore, a legal remedy is open to the Commissioner, for getting revised the order of the Income-tax Officer, which in his opinion is erroneous and prejudicial to public revenue, he cannot requisition to his aid the exceptional powers conferred upon him under s. 33-B of the Act.

* Income-tax Reference No. 40 of 1952.

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Held, therefore, that the order of the Commissioner of Income-tax acting under s. 33-B of the Act in setting aside the order of the Income-tax Officer while an appeal from that order was pending before the Appellate Assistant Commissioner, was not valid.

The Income-tax Officer, C Ward, Ahmedabad made the assessment on Messrs. Amritlal Bhogilal & Co. proprietors of Jawahar Hindu Hotel, Ahmedabad (Assessee) in respect of the assessment years 1947-48, 1948-49, and 1949-50, under s. 23 (3) of the Indian Income-tax Act, 1922. The assessee had applied for the registration of the firm and the Income-tax Officer passed an order under s. 26A granting renewal of the registration of the firm. The assessee appealed to the Appellate Assistant Commissioner who, on November 4, 1950, reduced the assessments for the years 1947-48 and 1948-49 and the appeal with regard to the year 1949-50 was still pending before him.

It appears that it came to the notice of the Commissioner of Income-tax that the firm which had been granted renewal of registration was not a firm which could be registered under the Indian Income-tax Act as one of the partners was a minor. He therefore purporting to act under s. 33-B (1) of the Act issued a notice to the assessee in that behalf and after hearing the assessee passed an order on June 5, 1952 with regard to all the three assessment years, namely, 1947-48, 1948-49 and 1949-50 cancelling the registration of the firm under s. 26 A and directing the Income-tax officer to make a fresh assessment according to law for each of the three years. In pursuance of the above order, the Income-tax Officer passed fresh orders without giving the assessee any notice or hearing and treating the assessee as an Association of Persons.

The assessee appealed to the Income-tax Appellate Tribunal in respect of the assessment years 1947-48 and 1948-49 and 1949-50. The Tribunal held that as the order under s. 23 (3) with regard to the assessment years 1947-48 and 1948-49 had been further modified or confined by the Appellate Assistant Commissioner, it could not be set aside by the Commissioner of Income-tax acting under s. 33-B (1) of the Act. The Tribunal also held that the direction given by him to the Income-tax Officer to cancel the registration of the firm was not according to law, for, as the Income-tax Officer had already granted renewal of registration it was not open to him to cancel it and that the Commissioner should have himself cancelled it. The Tribunal was further of opinion that fresh orders passed by the

Income-tax Officer against the assessee without giving them notice and without hearing them were also bad in law.

At the instance of the Commissioner the following questions of law were referred to High Court:—

(1) Whether on the facts and circumstances of the case the Commissioner of Income-tax acting under s. 33-B (1) can set aside orders passed by the Appellate Assistant Commissioner for the assessment years 1947-48 and 1948-49?

(2) Whether on the facts and circumstances case the order passed by the Commissioner of Income-tax, dated June 5, 1951, is bad in law as it directs the Income-tax Officer to pass an order in a particular manner?

(3) Whether on the facts and circumstances of the case, the orders passed by the Income-tax Officer dated June 21, 1952 are bad in law, as fresh notices as required by ss. 22 and 23 of the Income-tax Act were not given by the Income-tax Officer, to the assessee?

The Tribunal had not raised any question with regard to the assessment year 1949-50 in respect of which appeal was pending before the Appellate Assistant Commissioner. The High Court, therefore, framed the following question:

“Whether the order of the Commissioner acting under s. 33-B (1) setting aside the order of the Income-tax Officer while an appeal from that order was pending before the Appellate Assistant Commissioner was valid?”

Sir Nusserwanji P. Engineer with *G. N. Joshi*, for the applicant.

Sir Jamshedji B. Kanga with *R. J. Kolah*, for the respondents.

Chagla C. J. This reference substantially raises the same question that was raised in the last reference *Commissioner of Income-tax v. Tejaji Farasram*⁽¹⁾ viz., the power of the Commissioner to pass orders under s. 33-B of the Act. In that case we had to deal with the position where the Commissioner exercised his power after the Appellate Assistant Commissioner had made his order. In the present case the question arises which we left open in the last reference as to whether the Commissioner has the power to pass an order under s. 3 when an appeal has been preferred by the assessee and is pending before the Appellate Assistant Commissioner.

Now, the facts briefly are that the Income-tax Officer made assessment on the assessee in respect of the assessment years 1947-49, 1948-49 and 1949-50. The assessee was registered as a

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firm under s. 26A of the Act. The assessee appealed to the Appellate Assistant Commissioner and the Appellate Assistant Commissioner reduced assessment for the years 1947-48 and 1948-49, and the appeal with regard to the assessment year 1949-50 was still pending before him. The Commissioner then passed an order under s. 33-B, the effect of which was to direct the Income-tax Officer to cancel the registration of the firm under s. 26A and to assess the assessee as an unregistered firm. The order was made with regard to all the three assessment years 1947-48, 1948-49 and 1949-50. With regard to the assessment years 1947-48 and 1948-49 the question is now concluded by our judgment in the last reference inasmuch as the Commissioner exercised his powers under s. 33-B after the appeal had been decided by the Appellate Assistant Commissioner. It is clear that he had no jurisdiction to pass any orders under s. 33-B. The only question that survives for consideration in this reference is as to whether the position is any different for the assessment year 1949-50 inasmuch as the Appellate Assistant Commissioner had not passed any order and the appeal was still pending before him.

Sir Nusserwanji says that inasmuch as the order of the Income-tax Officer had not become merged in the order of the Appellate Assistant Commissioner under s. 33-B, the Commissioner had jurisdiction to revise the order of the Income-tax Officer. Sir Nusserwanji says that in this case clearly he was revising the order of the Income-tax Officer and not the order of the Appellate Assistant Commissioner and, therefore, on principle, the position is different from the position we considered in the last reference. Now, in our opinion, when one analyses s. 33-B a little more closely it is apparent that the Legislature never intended to give the power to the Commissioner to revise an order of the Income-tax Officer when the assessee had appealed from that order. As pointed out in the last reference, the object of enacting s. 33-B was to confer a power upon the Commissioner in the interest of revenue to revise orders of the Income-tax Officer which could not be revised under any circumstances if the assessee did not appeal from those orders. However, erroneous the order of the Income-tax Officer may be, however, prejudicial to the revenue, the assessee by refusing to exercise his right of appeal could make that order conclusive. In order to fill up this obvious lacuna the Legislature enacted s. 33. But once the assessee has appealed, there is no difficulty whatsoever

in the way of the department in agitating any question before the Appellate Assistant Commissioner which in its opinion should be agitated and decided in the interest of public revenue. Now, it is clear that when an appeal is pending before the Appellate Assistant Commissioner, the Income-tax Officer has the right to be heard either in person or by a representative, and the very point which the Commissioner has taken and on which he has given his decision under s. 33-B could have been urged under the directions of the Commissioner before the Appellate Assistant Commissioner. It is only when no remedy is open to the Commissioner to revise the order of the Income-tax Officer, that this jurisdiction under s. 33-B arises. But when a legal remedy is given to him to get the orders of the Income-tax Officer revised, he cannot requisition to his aid the power conferred upon him under s. 33-B. Once the appeal with regard to the year 1949-50 was pending before the Appellate Assistant Commissioner the Commissioner was given the full right to get the order of the Income-tax Officer revised in any manner he thought necessary in the interest of public revenue. He had to satisfy the Appellate Assistant Commissioner that the firm had been wrongly registered and that the registration should be cancelled and if he could not induce the Appellate Assistant Commissioner to take the view he had taken, he had a further right to go to the Tribunal. Therefore, instead of getting a decision from the ordinary Tribunals set up under the Income-tax Act, viz., the Appellate Assistant Commissioner, and the Appellate Tribunal the Commissioner exercised his revisional powers under s. 33-B. In our opinion, the revisional powers are exceptional powers to be exercised at exceptional time, for exceptional reasons, and the exceptional reason for which the powers can be and should be exercised is when the Commissioner feels that the public revenue is likely to suffer and that no remedy is open to him to get the order of the Income-tax Officer revised. As he had a clear obvious remedy in the appeal which was pending before the Appellate Assistant Commissioner, in our opinion, he had no jurisdiction to exercise his powers under s. 33-B. In view of this decision it is unnecessary to decide the other questions raised by the Tribunal.

The answer to question No. 1 will be in the negative. This question only deals with the years 1947-48 and 1948-49. As the Tribunal has also dealt in its judgment for the year 1949-50,

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but has not raised any specific question with regard to that assessment year, we think it necessary to raise a question which clearly arises from the order of the Tribunal and in respect of which all necessary facts are set out in the statement of the case. The question raised will be:—

“Whether the order of the Commissioner acting under s. 33B (1) setting aside the order of the Income-tax Officer while an appeal from that order was pending before the Appellate Assistant Commissioner was valid?”

and we answer that question in the negative. Question No. 2—It is unnecessary to answer this question. Question No. 3—“Whether on the facts and circumstances of the case, the orders passed by the Income-tax Officer, dated June 21, 1952, are bad in law, as fresh notices as required by ss. 22 and 23 of the Income-tax Act required by ss. 22 and 23 of the Income-tax Act were not given by the Income-tax Officer to the assessee?” In our opinion, it is unnecessary to decide this question because all proceedings taken by the Income-tax Officer pursuant to the orders passed by the Commissioner under s. 33-B must be bad inasmuch as we have held that the orders of the Commissioner are bad.

The Commissioner to pay the costs.

Attorneys for Commissioner: *N. K. Petigara.*

Attorneys for respondent: *Manilal Kher Ambalal and Co.*

Answer accordingly.

P. M. P.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Tendolkar.

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 MESSRS. MEHTA PARIKH AND CO., AHMEDABAD, APPLICANTS v.
 THE COMMISSIONER OF INCOME-TAX, BOMBAY NORTH, KUTCH
 AND SAURASHTRA, BARODA.

Indian Income-tax Act (XI of 1922), s. 66 (1) and (2)—Reference to High Court—Limited power of High Court to interfere with finding of facts by Income-tax Appellate Tribunal—Circumstantial evidence—Inference drawn from such evidence when could be interfered with—No application to the Tribunal under s. 66 (1) on a particular point of law—Whether High Court has jurisdiction to require the Tribunal to state a case on such point.

* Income-tax Reference No. 35 of 1952.